No. 89-1272

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

SAMUEL K. SKINNER, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
STUART M. GERSON
Assistant Attorney General
LEONARD SCHAITMAN
ROBERT V. ZENER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Fourth Amendment prohibits random drug testing of employees of the Department of Transportation whose positions bear "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-28a) is reported at 885 F.2d 884. The opinion of the district court (Pet. App. 29a-37a) is reported at 670 F. Supp. 445.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1989. On November 28, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 8, 1990. On December 28, 1989, the Chief Justice further extended the time for filing a petition to and including February 7, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 29, 1987, the Secretary of Transportation announced a plan for testing employees of the Department of Transportation for unlawful drug use. Employees may be subjected to urinalysis in one or more of seven circumstances.[1] Those employed in "Category I" positions – whose positions bear "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security" (Pet. App. 4a) – may be required to submit to random testing. Those positions principally include air traffic controllers – a group that is not party to these proceedings – but also include aviation safety inspectors, motor carrier and highway safety specialists, railroad safety inspectors, civil aviation security specialists, aircraft mechanics, and motor vehicle operators. *Id.* at 2a, 4a-5a.

Petitioners, labor organizations and certain Category I employees, brought this action, alleging that the Department's drug-testing program was unconstitutional under the Fourth and Fifth Amendments, and that it violated certain federal statutes. The district court upheld the program (Pet. App. 29a-37a), concluding that "the preponderance of the proof supports the reasonableness of the random plan" (*id.* at 36a). The court explained that the Department's "duty to assure the integrity of its sensitive aviation and other critical jobs and to protect the public safety is undisputed" (*ibid.*). Moreover, the court observed, "[t]he plan reflects a high degree of concern for employee privacy interests and is carefully tailored to assure a minimum of intrusion" (*ibid.*). The court accordingly concluded that "[t]he plan

[1] At all times pertinent to this case, the categories of drug testing under the plan included: (1) random; (2) periodic; (3) reasonable suspicion; (4) pre-employment/pre-appointment; (5) accident or unsafe practice; (6) voluntary; and (7) follow-up. Pet. App. 2a n.1.

must be sustained" against petitioners' "generalized facial attack" (*ibid.*).[2]

2. The court of appeals affirmed (Pet. App. 1a-28a). Applying this Court's decisions in *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989), the court explained that "the testing plan serves needs other than law enforcement, and therefore need not necessarily be supported by any level of particularized suspicion." Pet. App. 9a. Instead, the court continued, "[i]n order to determine the appropriate standard of reasonableness" under the Fourth Amendment, a court must "balance the individual[s'] privacy expectations against the Government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.* at 9a-10a.

Applying that standard, the court concluded that the Department's random drug-testing program is reasonable. On the one hand, the court noted, "the record amply evidences the extraordinary safety sensitivity of the bulk of the covered positions"—including the three categories of employees that petitioners had singled out for criticism. Pet. App. 11a. On the other hand, the court concluded that ran-

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[2] In reaching that conclusion, the district court rejected the contention that three of the positions to which the Department's drug-testing plan extends—mail van operators, railroad hazardous material inspectors, and aircraft mechanics—are "noncritical," thus demonstrating the overall unreasonableness of the testing program. Pet. App. 35a & n.10. The court found that mail van operators have security clearances and carry classified documents; that aircraft mechanics are involved in the installation, inspection and maintenance of aviation equipment and that their failure "could result in an aircraft crash"; and that railroad inspectors are "exposed to poisonous, explosive, and highly flammable commodities that could be leaking from rail cars or containers, or suddenly ignited by improper handling." *Id.* at 35a n.10.

dom testing does not unduly intrude on privacy expectations. The court explained that "[w]hile it is true that random testing may increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence." *Id.* at 13a. The court also noted that the covered employees work in settings in which there is, in any event, "a diminished expectation of privacy" concerning "information relating to the physical condition of covered employees." *Id.* at 18a.

ARGUMENT

Petitioners broadly contend (Pet. 7-14) that random drug-testing is a per se violation of the Fourth Amendment. Relatedly, they assert (Pet. 15-17) that the circuit courts have uniformly failed to appreciate the unusually intrusive nature of random testing. There is no merit to those contentions. The court of appeals' decision – approving the Department's random testing program – is faithful to the principles articulated by this Court in *Skinner* and *Von Raab*, and six circuits, including the court below, have rejected petitioners' contrary view. Further review is therefore unwarranted.

1. Petitioners contend that random testing is so intrusive that it cannot be consistent with the Fourth Amendment – regardless of the safety or security considerations that it might serve, or the other job-related circumstances that might have reduced the employee's expectation of privacy. However, six circuits have now upheld programs providing for random drug testing against similar Fourth Amendment claims. See *Guiney* v. *Roache*, 873 F.2d 1557 (1st Cir.) (Boston police officers required to carry firearms), cert. denied, 110 S. Ct. 404 (1989); *Transport Workers' Union, Local 234* v. *Southeastern Pa. Transp. Auth.*, 884 F.2d 709 (3d Cir. 1989) (public transit employees); *Thomson* v.

Marsh, 884 F.2d 113 (4th Cir. 1989) (Army civilian employees with access to chemical warfare materiel); *Taylor* v. *O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (correctional officers in regular contact with prisoners); *Rushton* v. *Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees); *National Fed'n of Fed. Employees* v. *Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (Army civilian employees who fly and service aircraft, who occupy law enforcement positions, or who provide drug counselling), cert. denied, 110 S. Ct. 864 (1990); *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (Department of Justice lawyers with top secret security clearances), cert. denied, 110 S. Ct. 865 (1990).

Except for *Rushton*, which was cited with approval in *Skinner*, 109 S. Ct. at 1419, all of these decisions were issued after this Court's decisions in *Von Raab* and *Skinner*. Notwithstanding the fact that the programs at issue provided for *random* testing, the courts uniformly applied the balancing approach outlined by this Court last Term, which requires a court to weigh "the public interest in the * * * testing program against the privacy concerns implicated by the tests, * * * to assess whether the tests required * * * are reasonable." *Von Raab*, 109 S. Ct. at 1397. None of the courts suggested that random testing is governed by a different legal standard under the Fourth Amendment.

2. Contrary to petitioners' suggestion (Pet. 15-17), the courts of appeals have not ignored the particular nature of random testing in undertaking the balancing required by the Fourth Amendment. Indeed, the District of Columbia Circuit has acknowledged that the random nature of the agency testing is a "relevant consideration" that might "tip the scales" in a particularly close case. *Harmon* v. *Thornburgh*, 878 F.2d at 489 (emphasis omitted). But as the court below pointed out, the randomness feature weighs on both sides of the scale: "While it is true that random testing may

increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence." Pet. App. 13a. In any event, the courts of appeals have uniformly rejected the contention that random testing calls for a fundamentally different constitutional analysis.

Petitioners also contend (Pet. 10-11) that random testing cannot be squared with this Court's observation in *Skinner*, 109 S. Ct. at 1417, that a search may be reasonable without individualized suspicion "where the privacy interests implicated by the search are minimal." But there is no conflict with *Skinner*. Random testing involves no greater physical restraint on the individuals tested than the program in *Skinner*. What is more, nothing in this Court's decisions suggests that an employee has a fundamentally greater expectation in avoiding random testing than the types of testing at issue in this Court's cases. Moreover, while an employee will not receive notice of the particular date on which a random test will be taken, the employee must be provided with advance notice that random testing will occur at some date.[3] The notice requirement mitigates any tendency of the program to engender "concern or even fright," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and provides "visible evidence, reassuring to law-

[3] Executive Order No. 12,564, 3 C.F.R. 224, 226 (1986 Comp.), requires agencies to give their employees 60 days' notice before a drug testing program is implemented. In addition, employees who are subject to random testing must receive another notice, not less than 30 days before testing begins. FPM Letter 792-19, § 4.b, 54 Fed. Reg. 47,331 (1989).

To be sure, the particular time or date of the random test is kept a surprise, in order to deny employees who use drugs an opportunity to defeat the purpose of the tests by abstaining for a period of time. However, that degree of "surprise" is no different from that contemplated by the random checkpoint stops to which the Court alluded in *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979).

abiding" employees, that the random tests are "duly authorized and believed to serve the public interest." *Id.* at 559.

In short, random testing is not so inherently intrusive that it constitutes a per se violation of the Fourth Amendment. Rather, as the court of appeals held, random programs should be analyzed within the framework established by this Court in *Skinner* and *Von Raab*. The court below applied precisely that framework, and petitioners offer no basis for believing that it did so incorrectly.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *
STUART M. GERSON
Assistant Attorney General
LEONARD SCHAITMAN
ROBERT V. ZENER
Attorneys

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* The Solicitor General is disqualified in this case.

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